In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. ~~605~~ 24

UNITED STATES OF AMERICA,
Petitioner,
vs.
E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE and HARLAN L. MCFARLAND,
Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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Come now respondents, E. B. Hougham, Owen Dailey, William E. Schwartze and Harlan L. McFarland, in answer to the Petition of the Solicitor General for a Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the Ninth Circuit and respectfully request that said Petition be denied.

OPINIONS BELOW

The opinions below are correctly stated in the Solicitor's Petition.

JURISDICTION

Jurisdiction is correctly stated in the Petition.

STATUTE INVOLVED

The statute involved is correctly stated in the Petition.

REASONS FOR DENYING THE WRIT

It is submitted that the Writ should be denied for the following reasons:

1. The question raised is not contained in the record of proceedings of the courts below.

2. By proceeding to trial upon the second amended complaint the Government waived any right it might have had to seek permission of the trial court to change its remedy.

3. The evidence presented by the Government would not have supported any recovery under the second alternative of the Act.

4. The decision is not in conflict with *Bernstein v. United States*.

5. There is no valid reason for granting the writ.

6. The question has become moot.

POINT 1:

THE QUESTION RAISED IS NOT CONTAINED IN THE RECORD OF PROCEEDINGS OF THE COURTS BELOW.

The question presented by the Government in its petition—whether the Surplus Property Act, which confers upon the Government the right to elect one of three different measures of damages, permits the trial court, rather than the Governmental Officials acting under the Solicitor General to make the election—was never properly presented to the Court below and has never been passed upon by it, or by the Appellate Court in this proceeding. It is true, as suggested on pages 4 and 5 of the petition, that the pre-trial order contained a reference to the Government's then contention that while it (the officials acting under the Solicitor General) alone had the sole right to make the election, that it further then contended it was entitled to make its election at any time prior to judgment. Such a procedure, however, is insufficient to bring the point either to the trial court for a ruling, or to raise the question on appeal, in view of the other procedure previously taken by the Government in voluntarily withdrawing a first amended complaint, which sought a recovery upon the basis of twice the consideration agreed to be given, and thereafter filing a second amended complaint upon which the Government went to trial, whose prayer contained the selection of the first remedy of $2,000.00 for each act. This appears on pages 49 and 54 of the Transcript and is subsequently set forth in Respondents' Brief, pages 3 to 6. It is thus seen that the Court at no time made any election, but proceeded in accordance with normal

and usual trial procedures to interpret the evidence within the framework of the issue raised in the complaint upon which the Government elected to stand trial.

All that the trial court did, which the Appellate Court affirmed, was to interpret the evidence with the end in view of equitably determining the scope, breadth and number of tricks and/or devices involved. This has always been the prerogative of the trial court.

The authorities are clear that where the tricks or devices used do not involve a monetary fraud, the mere fact that monies are eventually paid does not make the scheme a monetary fraud.

The leading case upon the subject is *U.S. v. Hess*, 87 Law. Ed. 443. There open bidding was required on WPA projects and certain contractors conspired to prevent competitive bidding, as a result of which 57 WPA projects were contracted for. Under these projects thousands of individual items of property and payments of money were involved. The Government contended that the $2,000.00 penalty applied to each of the thousands of items. The Court held that there was one conspiracy only in reference to each WPA project and allowed a recovery upon the basis of 57 projects.

In *U.S. v. Rohleacher*, 157 Fed. Supp. 126, there were considered 8 main contracts, under which 96 purchase orders were involved. The Government contended for the $2,000.00 penalty on each of the 96 pur-

chase orders. The Court limited the recovery to the 8 main contracts only.

In *U.S. v. Grannis*, 172 Fed. 2d 507, 10 vouchers involving fictitious claims for rental of 130 cars were involved. The Government contended that there were 140 violations, e.g., the 10 vouchers plus the 130 units and claimed damages in the amount of $280,000.00. The recovery was limited to 10 violations, and $20,000.00 only was allowed. (Certiorari denied by the Supreme Court.)

In *First National Bank of Birmingham v. U.S.*, 117 Fed. 486, the Bank sued for $12,000.00 due upon a Government contract assigned to it. In offset to this demand the Government claimed $2,000.00 per voucher on 13 vouchers, all of which were fraudulent claims since they were demands for work not performed The Government was allowed the offset because each voucher was tainted with a separate fraudulent claim.

In *U.S. v. American Parking Car*, 125 Fed. Supp. 788, vouchers for payment were submitted containing separate false statements. Held a separate act for each separate false statement.

In *Rex Trailer Co. v. U.S.* (1956), 100 Law. Ed. 160, 5 trucks were purchased through schemes involving 5 separate veterans.

The recovery of $2,000.00 for each act was allowed upon the theory that the fraudulent use of each veteran's name constituted one transaction. It is true that the cases cited deal with the application of the so-called "False Claims Act" and not the "Surplus

Property Act". The question involved, however, is identical in both Acts because they both contain the identical civil penalty clause, and both Acts necessarily leave to the trier of fact the right to define the extent and character and breadth of the trick, scheme or device, dependent upon the particular circumstances of each case.

POINT 2:

BY PROCEEDING TO TRIAL UPON THE SECOND AMENDED COMPLAINT THE GOVERNMENT WAIVED ANY RIGHT IT MIGHT HAVE HAD TO SEEK PERMISSION OF THE TRIAL COURT TO CHANGE ITS REMEDY.

Conceding, but not admitting, that the Government might have upon equitable terms, with permission of the Court, at a reasonable time before trial, amended its complaint to change its form of remedy sought, it certainly waived that right by going to trial upon the second amended complaint, which sought a recovery of $2,000.00 per act. The Government may be estopped of record by its attorneys and officers representing it when once in court. *First Nat. Bank v. U.S.*, 2 F. Supp. 107.

In fact it has been held that the commencement of any proceeding to enforce one remedial right, in a court having jurisdiction to entertain such a proceeding, is such a decisive act as constitutes a conclusive election, barring the subsequent prosecution of any inconsistent remedial rights. *U.S. v. Oregon Lumber Co.*, 260 U.S. 290, 67 L. Ed. 261, 42 S. Ct. 100;

Minneapolis Nat. Bank of Minneapolis, Kan. v. Liberty Nat. Bank of Kansas City, C.C.A. Kan., 72 F. 2d 434.

POINT 3:

THE EVIDENCE PRESENTED BY THE GOVERNMENT WOULD NOT HAVE SUPPORTED ANY RECOVERY UNDER THE SECOND ALTERNATIVE OF THE ACT.

Reference is made to pages 5 and 6 of the Petition and to those portions of the Transcript referred to in the footnotes. It will be noted that in every case the document involved is an invoice marked "Paid in Full". In no part of this record is there any contract wherein monies are "agreed to be paid". Every transaction in which money was involved was a spot cash transaction where the money was paid and the title transferred simultaneously. Yet the portion of the statute which the Government seeks to use as a springboard to recover double again the value of the articles, after having been paid in full the fair value of the articles, as fixed by the Government's own pricing agency, reads as follows:

> "(2) shall, if the United States shall so elect, pay to the United States as liquidated damages a sum equal to twice the consideration *agreed to be given* by such person to the United States or any governmental agency, or"

A fair reading of the Act as a whole would disclose an intention upon the part of Congress to offer various remedies to cover every conceivable type of situation and to leave to the Government the option of

selecting the remedy appropriate to the occasion; thus, certain types of frauds which would not involve fraud of a monetary nature or an executory contract could be appropriately reached under the first section; executory contracts which involved a monetary fraud, such as a conspiracy to avoid full payment, or to unlawfully secure the reduction of an obligation, could be appropriately dealt with under the second portion; and where the property still remained within reach of the Government, it could recover under the third portion. This is a fair interpretation of the Act, and not a harsh, unconscionable, unreasonable and unrealistic interpretation, such as the Government seeks.

The report of the Senate Committee on Military Affairs, at the time the Act was under consideration by that body, discloses the following:

> "Penalty and Fraud Provisions—
>
> Subsection (b) of this section deals with the civil liability of persons who engage in false, fraudulent, or fictitious activities, or conceal or misrepresent material facts, or act with intent to defraud the United States, or who enter into an agreement or conspiracy or cause other people to do any of the foregoing. The United States is given the option of electing among three different measures of damages—
>
> (1) Any person engaged in such activities can be *sued* for the sum of $2,000 for each such act, plus twice the amount of any damage sustained by the United States, plus the cost of suit.
>
> (2) The United States may recover from such person twice the consideration *which he agreed to give to it.*"

The language of the Senate Committee Report discloses a clear intent to limit the second remedy to transactions which involved contracts executory in nature where a portion of the contract remained to be paid. This view was adopted by the trial court's finding No. 4 (Transcript 108); finding No. 8 (Transcript 111); finding No. 12 (Transcript 114); and its decision was approved by the Appellate Court, which stated:

> "The trial court unquestionably believed that twice the consideration 'agreed to be paid' was not applicable here. And it seems much more apposite to a contract where the property has not passed but a consideration has been agreed upon."

POINT 4:

THE DECISION IS NOT IN CONFLICT WITH BERNSTEIN v. UNITED STATES.

The *Bernstein* case is distinguishable from the case at bar in several vital features. In the first place, the point was properly presented to the trial court by the Government, and a ruling was there made. The ruling was made that the Government was held to its election because of the inequities which would flow from allowing it to change its position. On appeal this position was reversed, because the Appellate Court felt that the inequities were not of sufficient gravity to prevent the Government from exercising its option upon reasonable notice, the consent of the trial court, and at a time when no prejudice would result to the litigants. Second, the Government did not seek

to change from the first to the second portion of the Act, but from the first to the third alternative, which it sought to further combine with the recovery of the proceeds of the resale of the property.

Under the doctrine of constructive trust, there was evidence in the record taken in the Court below which would support a recovery at least to some extent upon the alternative remedy requested. In the instant case there is no evidence in this record which would support a recovery in any amount under the second alternative, because the transactions were of such character that never at any time was any money "agreed to be paid".

Finally, the *Bernstein* decision is in conflict with *U.S. v. Oregon Lumber Company*, supra; and *Minneapolis Nat. Bank of Minneapolis, Kan. v. Liberty Nat. Bank of Kansas City*, supra, which hold that the commencement of any proceeding to enforce one remedial right in a court having jurisdiction to entertain such proceeding, is a sufficiently decisive act as constitutes a conclusive election, barring the subsequent prosecution of inconsistent remedial rights.

POINT 5:

THERE IS NO VALID REASON FOR GRANTING THE WRIT.

It has been previously pointed out that the trial court was not attempting to select one of the three alternative remedies provided by the Act, but was merely applying the evidence to the remedy selected by the Government. For years this has been accepted

procedure. Appellee's Brief pages 26-28. It is difficult to see how this decision can affect adversely any cases now pending, or others which may be filed in the future, because it is a sound application of the clear provisions of the Act.

The Government's argument on pages 10 and 11 of its brief is self-destructive. The proposition for which it argues would create, not eliminate, the suggested hazard of forcing litigants to prepare a defense to all three provisions of the Act, if the Government were permitted to wait until the conclusion of a trial to quit changing its mind.

POINT 6:

THE QUESTION IS MOOT BECAUSE THE GOVERNMENT HAS ACCEPTED PROMISSORY NOTES IN PAYMENT OF THE JUDGMENT AND MONIES HAVE BEEN PAID UPON THE PROMISSORY NOTES.

On April 20, 1958, promissory notes were forwarded the Government to cover the judgment entered therein and to release the judgment liens filed in Los Angeles County and Kern County.[1]

---

[1] "April 18, 1958

Richard A. Lavine, Esq.
Assistant United States Attorney
Southern District of California
600 Federal Building
Los Angeles 12, California

Dear Mr. Lavine: Re: U.S. vs. Hougham, et al
Civil No. 1423-ND

I enclose the following:

1. Promissory Note dated April 14, 1958, executed by E. B.

The notes were accepted by the Government and a release of liens executed.[2]

Hougham and Owen Dailey, payable to the Treasurer of the United States, in the sum of $2,054.36;

2. Promissory Note bearing the same date, in the same amount, payable to the same party executed by E. B. Hougham and William E. Schwartze; and

3. Promissory Note dated April 10, 1958, executed by E. B. Hougham and Harlan L. McFarland, payable to the Treasurer of the United States, in the sum of $4,108.72.

You may consider these documents delivered when you have executed and returned to me, with your signature duly acknowledged, the Full Release of Judgment Liens which I also enclose.

Thanking you kindly for your courtesies in respect to this matter, I am

Yours very truly,
Calvin H. Conron, Jr. of
Conron, Heard & James

CHC:HR"

[2]"April 21, 1958

Conron, Heard & James
Attorneys at Law
Suite 7, Haberfelde Building Arcade
Bakersfield, California

Re: United States v. Hougham, et al.
Civil No. 1423-ND

Gentlemen:

Reference is made to your letter of April 18, 1958. In accordance with your instructions we enclose Full Release of Judgment Liens for the Counties of Los Angeles and Kern, respectively. The signature of Richard A. Lavine has been acknowledged on each of these documents.

Very truly yours,
Laughlin E. Waters
United States Attorney
Richard A. Lavine
Assistant U. S. Attorney

RAL:dp.
Enc."

The Government has accepted monies in payment of the installments provided for in the notes.[3]

Under these conditions the Government should be estopped from further pressing its demands in this proceeding.

---

[3] "April 15, 1959

Mr. Wayne M. Hamilton
Conron, Heard & James
Attorneys at Law
Suite 7, Haberfelde Building Arcade
Bakersfield, California

Re: U. S. Hougham, et al
No. 1423 (ND) Civil

Dear Sir:

Receipt is acknowledged of your letter of April 14, 1959, enclosing three checks, namely, $1242.09, $1242.09, and $2484.18.

We are enclosing the following receipts:

Receipt No. 44652, dated April 15, 1959, for $2484.18 for Harlan L. McFarland and E. B. Hougham

Receipt No. 44653, dated April 15, 1959, for $1242.09, for William E. Schwartze and E. B. Hougham

Receipt No. 44654, dated April 15, 1959, for $1242.09 for Owen Dailey and E. B. Hougham.

Thank you for your cooperation in the matter.

Very truly yours,
Laughlin E. Waters
United States Attorney
Carla A. Hills
Assistant U. S. Attorney

CAH:mlb
Judgment Unit
encls."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition should be denied.

Dated, Bakersfield, California,
January 14, 1960.

Respectfully submitted,

W. E. JAMES,
CONRON, HEARD & JAMES,
Attorneys for Respondents.

SUPREME COURT OF THE UNITED STATES

No. 24.—October Term, 1960.

United States of America, Petitioner, v. E. B. Hougham, et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November 7, 1960.]

Mr. Justice Black delivered the opinion of the Court.

Section 16 of the Surplus Property Act of 1944 gave priority preferences to veterans in the purchase of surplus war materials. 58 Stat. 765. Section 26 authorized the United States to recover damages against any person who obtains such property from the Government by "fraudulent trick, scheme, or device . . . ." The complaint in this case charged that respondent Hougham, a nonveteran, combined with the other respondents, who are veterans, and obtained for his own business purposes hundreds of items of surplus property, including trucks, trailers and other equipment, by fraudulent use of the veteran respondents' priority certificates. After hearings, the District Court found respondents guilty of the fraud as charged and awarded damages in the amount of $8,000. Both sides appealed. The Court of Appeals affirmed, rejecting both the Government's contention that the damages awarded were inadequate and the respondents' contentions that the finding of fraud was clearly erroneous and that the claims were barred by the statute of limitations. 270 F. 2d 290. Because the case raises important questions concerning the interpretation and application of the Surplus Property Act, we granted the Government's petition for certiorari. 361 U. S. 958.

The respondents first contend that the entire controversy here has been settled, is therefore moot, and that the

Government is estopped from further pressing claims against them. This contention rests upon the fact—set out in respondents' brief and not disputed by the Government—that after the trial court judgment was entered and before it was affirmed by the Court of Appeals, the Government accepted from respondents promissory notes totalling $8,000, the amount of the trial court judgment. The contention is that this fact alone renders the case moot or at least creates some sort of estoppel against the Government. We disagree. It is a generally accepted rule of law that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim. See, for example, *Embry* v. *Palmer*, 107 U. S. 3; *Erwin* v. *Lowry*, 7 How. 172, 183–184. This case provides a perfect example of the good sense underlying that rule. For here it was the respondents themselves who proposed payment of the $8,000, asserting expressly as their purpose in so doing the obtaining of a "Full Release of Judgment Liens" filed in the Counties of Los Angeles and Kern. The Government did nothing more in the entire transaction than accept the notes and execute the requested release. Since that release was expressly denominated only as a "Full Release of Judgment Liens" for the Counties of Los Angeles and Kern, it simply is not and cannot properly be interpreted to constitute a full release of all the Government's claims against respondents. Moreover, since the transfer of the notes occurred prior to the decision of the Court of Appeals, it is clear that neither of the parties regarded that transfer as an accord and satisfaction of the entire controversy for *both* pursued their appeals in that court. Thus respondents' contention here is totally inconsistent with their position in the Court of Appeals

where they sought to avoid *all* liability to the Government, including liability for the $8,000 they had already paid. For that position must necessarily have been predicated upon the view that the payment was without prejudice to the rights of either party as those rights might come to be established by subsequent judicial decree. Under such circumstances, the contention that the Government has lost its right to press its claim for the full amount of damages it believes due is wholly untenable.

We find it unnecessary to discuss at length respondents' second contention—that the claims asserted by the Government are barred by the statute of limitations. It is sufficient to say that the courts below were entirely correct in rejecting that contention for, resting as it does upon the assumption that recoveries under § 26 (b) are penalties, it is inconsistent with our holding in *Rex Trailer Co.* v. *United States*, 350 U. S. 148.

We therefore proceed to the principal controversy—the question of the adequacy of the damages awarded to the Government. Section 26 (b) provides in relevant part that those who obtain property by the kind of fraud established here:

> "(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or
>
> "(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or
>
> "(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as

liquidated damages any consideration given to the United States or any Government agency for such property."

In its complaint as originally filed, the Government claimed recovery as authorized by § 26 (b)(1)—$2,000 for each fraudulent act plus double the amount of any actual damages. Subsequently, the Government attempted to file a First Amended Complaint claiming liquidated damages under § 26 (b)(2). Upon indication of the trial judge that the claim in the original complaint under § 26 (b)(1) amounted to an irrevocable election of remedies, but without any formal ruling to that effect, the Government withdrew the First Amended Complaint and filed a Second Amended Complaint in which it reverted to its original claim under § 26 (b)(1). Still later however, following pretrial proceedings under Rule 16 of the Federal Rules of Civil Procedure, the district judge, with the approval of counsel for both parties, entered a pretrial conference order which provided, "[T]his order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice." And the order expressly enumerated the "issues of law" that remained "to be litigated upon the trial." One of the issues so reserved was the legal correctness of the Government's argument that it was entitled to recover "double the amount of the sales price of the vehicles described in the Second Amended Complaint," that it was "entitled to make its election [as between § 26 (b)(1) and § 26 (b)(2).] at any time prior to judgment" and that it did then elect "in the event of judgment in its favor, to receive as liquidated damages a sum equal to twice the consideration agreed to be given to the United States." The District Court ultimately decided this legal issue against the Government, holding that the original complaint constituted an irrevocable election, and proceeded to award damages of $8,000 under § 26 (b)(1).

The Court of Appeals affirmed this judgment on a different ground: it held that the refusal of the District Court to permit recovery under § 26 (b)(2) was within its power to determine the appropriate remedy under § 26 (b), asserting that no issue as to election of remedies was even involved in the case. 270 F. 2d, at 293.

The Government contends that denial of recovery under § 26 (b)(2) cannot be justified on either of the theories adopted below. Respondents contend that the Government waived its right to urge this contention by voluntarily proceeding to judgment on the Second Amended Complaint. This contention is predicated upon the failure of the Government to get a formal ruling on its First Amended Complaint before withdrawing it and filing the Second Amended Complaint. But, as shown above, the pretrial order and the conclusions of law of the District Court both show that the Government urged its right to change its election up to the time judgment was rendered. That pretrial order, as authorized by Rule 16, conclusively established the issues of fact and law in the case and declared that the issues so established should "supplement the pleadings and govern the course of the trial . . . ." One of these supplementary issues was the Government's contention that it was entitled to recover under § 26 (b)(2), rather than under § 26 (b)(1) as claimed in the Second Amended Complaint. Thus the pretrial order changed the claim in that complaint from § 26 (b)(1) to § 26 (b)(2) insofar as the Government had the power to change its election, and posed an issue which required adjudication by the District Court. That such was the effect of the order is clear from the language of Rule 16 which provides that the court, after pretrial conference, "shall make an order which recites . . . the amendments allowed to the pleadings . . . and such order when entered controls the subsequent course of the action, unless modified at the trial

to prevent manifest injustice." Since the pretrial order here reserved the legal question as to the Government's right to change its election and since the court expressly decided that question against the Government,* the question most certainly was not waived and must here be determined.

Thus, we come to the question whether the courts below were correct in holding that the Government was not entitled to damages under § 26 (b)(2). With respect to the theory adopted by the District Court that the Government's original complaint constituted an irrevocable election of remedies, we can find nothing either in the language of § 26 (b) or in its legislative history which lends the slightest support to such a construction. This fact leads naturally to the conclusion that the ordinary liberal rules governing the amendment of pleadings are applicable. The applicable rule is Rule 15 of the Federal Rules of Civil Procedure, which was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result. Despite respondents' argument to the contrary, we see this case as one where there plainly was no such prejudice. In such a situation, acceptance of respondents' contention on this point would subvert the basic purpose of the Rule. "The Federal Rules reject the approach that pleading is a game

*The language of the trial judge on this point was unequivocal: "This Court rules that the plaintiff United States can only receive liquidated damages under the provisions of Section 26 (b)(2) if it elects to receive only such damages originally in the action; that since the United States sought damages under the provisions of Section 26 (b)(1) in the original complaint, that such is an irrevocable election; that the plaintiff United States cannot thereafter amend its complaint to seek liquidated damages under the provisions of Section 26 (b)(2), or otherwise elect to receive liquidated damages under the provisions of Section 26 (b)(2), but that the United States is thereafter limited as the measure of its recovery for liquidated damages to those liquidated damages set forth in Section 26 (b)(1)."

of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U. S. 41, 48. We therefore conclude that under the circumstances of this case the Government had a right to amend its pleadings and that the District Court erred in refusing to permit such amendment.

The alternative theory of the Court of Appeals appears, upon examination, to be equally untenable. The Court of Appeals interpreted § 26 (b) as placing power in the District Court to determine, according to the evidence presented in any particular case, which of the three subsections would be most appropriate and to require the Government to accept judgment under that subsection. That interpretation collides with the express language of § 26 (b) which provides for recovery under any one of the three subsections "if the *United States* shall so elect." (Emphasis supplied.) Since the language of the section is conclusive on this point, the theory adopted by the Court of Appeals must also be rejected.

The respondents' final contention is that in any event they are entitled to a new trial. Obviously, there need be no new trial on the fraud issue. But respondents also urge that there is no support in the record for a judgment fixing the Government's recovery under § 26 (b)(2) at "twice the consideration agreed to be given" for the vehicles. There was no consideration "agreed to be given," the argument proceeds, because all the transactions involved cash sales at a price fixed by the Government. This argument, while ingenious, is not sound. Cash sales, like others, must follow an agreement of the parties with regard to consideration "to be given." Respondents' contention to the contrary would, if accepted, allow any purchaser from the Government to effectively avoid liability under § 26 (b)(2) simply by being careful to make all of its fraudulent dealings in

cash. Plainly, however, the Government suffers just as much from a fraudulent cash sale as from a fraudulent credit sale. An interpretation of § 26 (b)(2) which allows recovery for the one but not for the other cannot be accepted. The respondents' contention for a new trial must be rejected.

The judgment is therefore reversed and the cause remanded to the District Court with directions to enter judgment for the United States under § 26 (b)(2).

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 24.—October Term, 1960.

United States of America, Petitioner, v. E. B. Hougham, et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November 7, 1960.]

Mr. Justice Whittaker, with whom Mr. Justice Douglas joins, dissenting.

With all deference, I can not agree and must dissent for two reasons.

First. One may not appeal from a money judgment that he has collected and satisfied. Here, as the Court recognizes, after the judgment was entered the Government accepted promissory notes from respondents in payment of the judgment. I think, with, I respectfully submit, the support of all the relevant cases—which are legion—that the Government, having recovered a judgment for $8,000, over the serious protests of respondents that they owed it nothing, and having, with knowledge of all the facts, accepted the benefits of the judgment by collecting and satisfying it, cannot thereafter prosecute an appeal to reverse it.

The Court relies on *Embry* v. *Palmer*, 107 U. S. 3, and *Erwin* v. *Lowry*, 7 How. 172, 184, for its conclusion that the Government may prosecute this appeal from the judgment notwithstanding it has satisfied it. But, with deference, I must say those cases do not support the Court's conclusion. The issue in the *Embry* case was whether Embry was entitled to $9,185.18, as he claimed, or to only $2,296.29, as the respondents contended and admitted to be due. The court awarded recovery of only the latter sum which Embry accepted. He afterwards

appealed from the judgment, and it was held that he might do so for, as the court pointed out: "The amount awarded, paid, and accepted constitutes no part of what is in controversy." *Id.*, at 8. How different from the situation here! That case was like the later one of *Reynes* v. *Dumont*, 130 U. S. 354, where the appellants received so many of certain bonds as were not taken to satisfy the judgment from which they appealed. It was contended that their action in doing this so completely accepted the judgment that they could not appeal. In rejecting that contention, this Court said:

> "The acceptance by appellants of what was confessedly theirs cannot be construed into an admission that the decree they seek to reverse was not erroneous, nor does it take from appellees anything, on the reversal of the decree, to which they would otherwise be entitled. *Embry* v. *Palmer*, 107 U. S. 3, 8."

Those cases fall within a well-recognized but very narrow exception to the general rule that is applicable here. Similarly, the *Erwin* case did not involve the collection and satisfaction of a judgment. Rather, it involved only the performance by Erwin of a minor collateral "condition imposed upon him before he [could] have the fruits of the decree" in equity. *Id.*, at 184. Like *Embry*, that case does not at all rule the question here presented.

The case in this Court that most nearly rules our question is *Gilfillan* v. *McKee*, 159 U. S. 303. There appellant claimed an interest in a special fund of $7,070 and also claimed to be entitled jointly to participate in a general fund of $147,057.63. A portion of the special fund was awarded to him in one division of the judgment, but another division of the judgment denied to him any right to participate in the general fund. He appealed, and was

met with the claim that by accepting the award of a part of the special fund, he had taken under the judgment and therefore could not appeal from it. Recognizing that one cannot appeal from a judgment that he has collected and satisfied, the Court said: ". . . the acceptance of the whole or a part of a particular amount awarded to a defendant might perhaps operate to estop him from insisting upon an appeal." But the court found that "there were practically two decrees in this case, one applicable to the special fund, which, in the bill, the subsequent pleadings, and in the decree, had been kept as a distinct and separate matter, a portion of which fund was awarded to McPherson; and the other applicable to the general fund in which McPherson had been denied any participation whatever." And the court held that "his acceptance of a share in the special fund did not operate as a waiver of his appeal from the other part of the decree disposing of the general fund." *Id.*, at 311.

The Fourth Circuit has flatly ruled this question in *Finefrock* v. *Kenova Mine Car Co.*, 37 F. 2d 310, among other cases. There the appellant accepted payment of a judgment for an amount substantially less than he claimed and afterwards appealed. In holding that he could not appeal from a judgment that he had collected and satisfied, the court said at 314:

> "We do not find it necessary to enter into a discussion of these questions in view of the acceptance by the appellant of the amount allowed him in full satisfaction and discharge of the judgment. He contends that there is no inconsistency in his acceptance of the money and the prosecution of the appeal, relying on such decisions as *Embry* v. *Palmer*, 107 U. S. 3, 8, 2 S. Ct. 25, 27 L. Ed. 346; *McFarland* v. *Hurley* (C. C. A.) 286 F. 365; *Carson Lumber Co.* v. *St. Louis, etc., Railroad Co.* (C. C. A.) 209 F. 191,

193; *Snow* v. *Hazlewood* (C. C. A.) 179 F. 182. But it is obvious that he falls within the general rule and not within the exceptions thereto as set out in *Carson Lumber Co.* v. *St. Louis, etc., Railroad Co., supra.*"[1]

The Third Circuit has likewise flatly ruled the question in the same way, *Smith* v. *Morris*, 69 F. 2d 3; so has the Fifth Circuit, *Kaiser* v. *Standard Oil Co.*, 89 F. 2d 58; *White & Yarborough* v. *Dailey*, 228 F. 2d 836, and the Eighth Circuit, *Carson Lumber Co.* v. *St. Louis & S. F. R. Co.*, 209 F. 191. Literally dozens of cases by the courts of last resort in almost all the States in the Union have so held.[2]

I, therefore, respectfully submit that the settled law requires the conclusion that the Government, having col-

[1] In *Carson Lumber Co.* v. *St. Louis & S. F. R. Co.*, 209 F. 191 (C. A. 8th Cir.), the Court said, at 193–194:

"It is undoubtedly the general rule that a party who obtains the benefit of an order or judgment, and accepts the benefit or receives the advantage, shall be afterwards precluded from asking that the order or judgment be reviewed. Nevertheless, this rule is not absolute where the judgment or decree is not so indivisible that it must be sustained or reversed as a whole. It has no application to cases where the appellant is shown to be so absolutely entitled to the sum collected upon the judgment that the reversal of it will not affect his right to the amount accepted (*Reynes* v. *Dumont*, 130 U. S. 354–394; 9 S. Ct. 486, 32 L. Ed. 934), especially where there is not present conduct which is inconsistent with the claim of a right to reverse the judgment or decree, which it is sought to bring into review (*Embry* v. *Palmer*, 107 U. S. 3–8, 2 S. Ct. 25, 27 L. Ed. 346; *Merriam* v. *Haas*, 3 Wall. 687, 18 L. Ed. 29; *United States* v. *Dashiel*, 3 Wall. 688, 18 L. Ed. 268)."

[2] Those interested will find many of those cases collected in the notes to § 214 of Am. Jur., Vol. 2, Appeal and Error, p. 975, where the authors have regarded the rule as so certain and universal as to permit them flatly to say: "The general rule . . . is that a litigant who has, voluntarily and with knowledge of all the material facts, accepted the benefits of an order, decree or judgment of a court, cannot afterwards take or prosecute an appeal or error proceeding to reverse it."

lected and satisfied this judgment with knowledge of all the facts, cannot prosecute this appeal to reverse it. This appeal should, therefore, be dismissed.

Second. At all events, the Government is not entitled to a reversal of the judgment, because it went to trial, and proceeded all the way to judgment, upon a complaint that asked damages only under subdivision (1) of § 26 (b), not under subdivision (2) of that section. The procedural chronology was as follows. In its original complaint the Government sought damages "of $2,000 for each such act," under subdivision (1). It thereafter filed a motion for leave to file a First Amended Complaint asking damages in "a sum equal to twice the consideration agreed to be given," under subdivision (2). But it did not press that motion to decision. On the contrary, the record shows that the Government formally withdrew that motion and instead filed a Second Amended Complaint, again, as in its original complaint, asking damages in "the sum of $2,000 for each such act," under subdivision (1). It was upon that complaint that it went to trial and all the way to judgment.

Of course, under the express terms of 26 (b), the Government had the right to elect which of the three allowable measures of recovery it would seek, but surely it is possible for the Government at some stage irrevocably to make that election. I agree it did not irrevocably do so by the filing of the original complaint, but I insist that it did so by filing the Second Amended Complaint and going to trial and all the way to judgment on it. If that conduct did not effect the election, I would ask what could?

It is true that a pretrial conference was held and a pretrial order was entered, under Rule 16 of Fed. Rules Civ. Proc. One of the objects authorized by that Rule is "the simplification of the issues," and another is to consider "The necessity or desirability of amendments to

the pleadings." The order recited that one of the issues of *fact* to be tried was whether the "defendants became and are liable to pay to the United States the sum of $2,000 for each act committed by them that [may be] determined by the court to be in violation of said statute;" and, under "Issues of law . . . . to be litigated upon the trial," the following appears:

> "It is the contention of the plaintiff that it is entitled to double the amount of the sales price of the vehicles described in the Second Amended Complaint . . . . Previously the Court has indicated that an irrevocable election has been made by the United States by virtue *of the successive complaints on file.* It is the contention of plaintiff that it is entitled to make its election at any time prior to judgment. Plaintiff elects, *in the event of judgment in its favor,* to receive as liquidated damages a sum equal to twice the consideration agreed to be given to the United States or federal agency involved. Plaintiff respectfully calls this to the attention of the Court so that the point may be preserved for purposes of appeal." (Emphasis added.)

Of course, in simplifying the issues, the Court may, by the pretrial order, define the issues to be tried, *but those issues must be within the pleadings.* And amendments to the pleadings should be freely allowed as Rule 15 provides. But here the Government did not seek leave at the pretrial conference, or at any time after having voluntarily filed its Second Amended Complaint, to amend its pleading. It did not even unconditionally elect at the pretrial conference to proceed under subdivision (2) but only "in the event of judgment in its favor." Instead, it went all the way to trial, and to judgment, on the complaint that sought damages "in the sum of $2,000 for each such act," and it obtained a judgment on that

basis. Surely, that conduct constituted an irrevocable election by the Government to recover damages in the measure claimed in its final complaint, and I think the Government is bound by it.

For the first of these reasons, I would dismiss the appeal, but inasmuch as the Court does not agree, I would, at the minimum, affirm the judgment on the ground that the Government irrevocably elected to recover the measure of damages that it recovered and hence is bound by that election.